

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
August 9, 2005 Session

**STATE OF TENNESSEE v. R. L. WILLIAMS**

**Appeal from the Criminal Court for Davidson County  
No. 2002-B-1093     Steve Dozier, Judge**

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**No. M2004-02075-CCA-MR3-CD - Filed December 16, 2005**

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The Appellant, R. L. Williams, was convicted by a Davidson County jury of one count of rape by force, *see* T.C.A. § 39-13-503(a)(1), and one count of rape without consent, *see* T.C.A. § 39-13-503(a)(2), and was sentenced to twelve years in the Department of Correction. On appeal, he raises three issues for our review: (1) whether double jeopardy precluded dual convictions based upon a single act; (2) whether the trial court properly discharged its duty as thirteenth juror; and (3) whether the twelve-year sentence imposed was excessive. After review of the record, we conclude that entry of dual convictions was error. Accordingly, we remand for entry of corrected judgment forms whereby the conviction for rape without consent is merged with the conviction for rape by force. As to Williams' remaining assertions, we find no merit. Accordingly, the judgment of conviction for rape by force in Count 1 and the resulting twelve-year sentence are affirmed.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed;  
Remanded for Merger of Judgment of Conviction**

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

John E. Herbison, Nashville, Tennessee, for the Appellant, R. L. Williams.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Bernard McEvoy, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**Factual Background**

In 1987, the victim, L.S.,<sup>1</sup> and her sister were placed by the Department of Children's Services ("DCS") in the foster care of the Appellant and his wife, Ruth Williams. At the time of placement, the victim was six or seven years old, and she remained in the Appellant's home for the next twelve years. On November 30, 1999, the Appellant's wife injured her back. Mrs. Williams and the victim's sister later picked up the victim at her place of employment, Shoney's, and drove the victim home to be with the Williams' one-year-old biological daughter while Mrs. Williams went to the hospital. On this date, the eighteen-year-old victim was in high school and was working thirty hours per week at Shoney's.

When the Appellant arrived home that evening at approximately 9:00 p.m., the victim and the Appellant's daughter were watching television, and the Appellant joined them in the living room. When a program came on that made the victim uncomfortable, she removed the little girl from the room and started playing with her in the hallway. As the victim was bent over playing with the child, the Appellant grabbed her from behind and wrapped his leg around her to prevent her from moving. Despite her requests and pleas to stop, the Appellant pulled down the victim's pants and penetrated her vaginally with his penis. Afterwards, the victim locked herself in the bathroom. When she emerged she found the Appellant waiting for her. He asked her if she needed anything and told her that no one would believe her if she told what had happened.

The victim testified that she intended to tell her foster mother both that night and the next morning; however, she was unable to do so because of the Appellant's presence. She also testified that she tried to tell her sister what had occurred the next morning both at the bus stop and again later at school. According to the victim, upon discussing the matter with her sister at school, the sister became upset and began to make a scene in the classroom. At that point, the victim stated she told her sister that it never happened. Later in the day, a teacher noticed that the victim was visibly upset and began questioning her. Eventually, the victim told the teacher what had occurred, and a school police officer took the victim to the hospital for an examination.

A forensic examination was performed at Metro General Hospital, and the presence of sperm was detected. The victim was removed from the Appellant's home and placed in the temporary care of other foster parents outside Davidson County. The victim was eventually placed at Richland Village, a group care facility for juveniles with problems, because no other foster placement could be found. The victim testified that she felt like a prisoner at Richland Village, in addition to being separated from her family and friends. She eventually dropped out of high school and was forced to give up her part-time employment. She stated that she called the Appellant's sister-in-law, who told her that if she cleared up the situation, she could return to the Appellant's home. Based upon this statement, the victim testified that she wrote a letter to DCS claiming that the events had never occurred, that she had just dreamed it. However, she later maintained that she was raped by the Appellant.

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<sup>1</sup>It is the policy of this court to identify minor victims of sex abuse by their initials in order to protect the victim's identity.

DNA testing was subsequently performed on the samples collected from the Appellant and the victim. A comparison of the Appellant's DNA and DNA recovered from the vaginal swabs taken from the victim established a match.<sup>2</sup> The following probabilities were established: the probability of the sperm being from another African American other than the Appellant was 1/3,517,000, from a Caucasian person other than the Appellant was 1/10,790,000, from a Southeastern Hispanic other than the Appellant was 1/3,812,000, and from a Southwestern Hispanic was 1/5,552,000.

In June 2002, a Davidson County grand jury returned a two-count indictment against the Appellant charging him with rape by force and rape without consent for the November 30, 1999 incident. After a jury trial, the Appellant was found guilty of both counts as charged. Following a sentencing hearing, the trial court imposed a twelve-year Department of Correction sentence for each conviction, to be served concurrently. The Appellant subsequently filed both a motion for new trial and an amended motion for new trial, which were heard by the trial court on May 13, 2004. The motion for new trial was denied, and this appeal followed.

## **Analysis**

### **I. Merger/Double Jeopardy**

First, the Appellant asserts that “[u]nder the facts and circumstances of this case, dual convictions for a single criminal act cannot stand,” as they violate the principles of double jeopardy. We would agree that the victim's testimony described a single penetration of a single orifice by a single body part and lasted only a “few seconds.” Although the proof supports only a single act of penetration, the jury returned guilty verdicts on both Count 1, rape by force, and Count 2, rape without consent, based upon apparent alternative theories of prosecution. Following the verdicts, the court made the statement that, “We'll deal with the merger issue at the time of the sentencing hearing.” At the sentencing hearing, the trial court commented that “the Jury convicted [the Appellant] of these offenses; and they would merge into Count One, whereby he would be sentenced for one offense.” However, the record reflects that judgments of conviction were entered with regard to both counts, each reflecting a twelve-year sentence.

The State concedes that double jeopardy precludes two separate convictions in this case as the evidence established only one act of rape. The double jeopardy clauses of both the United States and the Tennessee Constitutions protect against being put in jeopardy twice for the same offense. U.S. CONST. amend V; TENN. CONST. art. I, § 10. Clearly, in this case, the trial court should have merged the separate convictions into a single judgment of conviction to protect the Appellant from multiple punishments for the same offense. *See State v. Hurley*, 876 S.W.2d 57, 70 (Tenn. 1993); *see also State v. Billy Harris*, No. W2003-01911-CCA-R3-CD (Tenn. Crim. App. at Jackson, Aug. 4, 2004) (noting that merger of convictions is appropriate in order to protect against double jeopardy when a jury convicts a defendant under alternate theories of the same offense).

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<sup>2</sup>Five of the thirteen “locations” examined and the gender marker for a DNA profile matched the Appellant. The remaining eight could not be determined because the sample was too small.

Accordingly, the case is remanded to the trial court with instruction to enter corrected judgment forms which reflect that the Appellant's conviction in Count 2 is merged with his conviction for forcible rape under Count 1.

## **II. Thirteenth Juror Rule**

Next, the Appellant contends that the trial court failed to properly exercise its function as thirteenth juror. He contends that, while the trial court cited the applicable law with regard to a Rule 33(f) motion in the analysis of the issue, the court addressed the separate issue of sufficiency of the evidence in its conclusion. Specifically, he argues that there is no indication that "the trial court independently weighed the evidence, that the trial court agreed with the jury's verdict, or that the trial court credited the testimony of the sole witness who testified to the allegedly criminal events- a witness who admitted to at least two out-of-court recantations!"

The standard of review of a motion for new trial upon grounds that the verdict is contrary to the weight of the evidence is governed by a different standard than that of a motion for judgment of acquittal or a sufficiency review. In considering sufficiency, the court is required to review the evidence from a standpoint most favorable to the prosecution and to assume the truth of the evidence offered by the State. However, the authority of the court is much broader when reviewing a motion for new trial under Rule 33(f). Under this Rule, the court must weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.

In *State v. Moats*, 906 S.W.2d 431, 434-35 (Tenn. 1995), our supreme court explained the reasoning for the thirteenth juror rule:

The purpose of the thirteenth juror rule is to be a "safeguard . . . against a miscarriage of justice by the jury." *State v. Johnson*, 692 S.W.2d 412, 415 (Tenn. 1985) (Drowota, J., dissenting). Immediately after the trial, the trial court judge is in the same position as the jury to evaluate the credibility of witnesses and assess the weight of the evidence, based upon the live trial proceedings. Indeed, this Court has recognized that "the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court." *Bolin v. State*, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966).

Tennessee Rule of Criminal Procedure 33(f) imposes a mandatory duty on the trial judge to serve as the thirteenth juror in every criminal case. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). "Rule 33(f) does not require the trial judge to make an explicit statement on the record. Instead, when the trial judge simply overrules a motion for new trial, an appellate court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict." *Id.* Only if the

record contains statements by the trial judge indicating disagreement with the jury's verdict or evidencing the trial judge's refusal to act as the thirteenth juror, may an appellate court reverse the trial court's judgment. *Id.* Otherwise, appellate review is limited to sufficiency of the evidence pursuant to Rule 13(e) of the Rules of Appellate Procedure. *State v. Burlison*, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993). If the reviewing court finds that the trial judge has failed to fulfill his or her role as thirteenth juror, the reviewing court must grant a new trial. *Moats*, 906 S.W.2d at 435.

In his motion for new trial, the Appellant asserted that the verdict was contrary to the weight of the evidence. At the conclusion of the hearing on the motion, the trial court took the matter under advisement and subsequently issued a written order denying the motion, which stated in relevant part:

The Court “must weigh the evidence and grant a new trial if the evidence preponderates against the weight of the verdict. *State v. Blanton*, 926 S.W.2d 953, 958 (Tenn. Crim. App. 1996); *see also* Tenn. R. Crim. P. 33(f). In order to grant a new trial, “the trial judge must disagree with the jury’s findings on the question of the defendant’s guilt.” *See State v. Hill*, 856 S.W.2d 155, 158 (Tenn. Crim. App. 1993). The trial court must “independently weigh the evidence and assess the witnesses credibility.” *See State v. Duckworth*, 919 S.W.2d 52 (Tenn. Crim. App. 1995). [sic (1995)]. The Court remembers this case and has reviewed its notes taken during the trial. In making this determination, the Court will examine all of the issues raised in the defendant’s motion.

The Defendant first argues that the jury verdict was against the weight of the evidence. The Court has reviewed its notes and recalls the testimony of the witnesses at trial. Pursuant to Rule 33 of the Tennessee Rules of Criminal Procedure, the Court is of the opinion that there was sufficient evidence to warrant a verdict of guilty on the above listed counts, *supra*.

It is apparent from a reading of the trial court’s order that the court was aware of its role under Rule 33(f) because it enunciated the relevant law, cited to applicable case law decisions, and, within that context, performed a review of the testimony of the witnesses at trial as contemplated by the rule. Nonetheless, it is also apparent that the trial court, in reaching its conclusion, misspoke by stating that the evidence was “sufficient” as the issue under review was one of “weight” as opposed to sufficiency.

The trial court’s order reflects that the trial judge was aware that to grant a new trial under Rule 33(f), “the trial judge must disagree with the jury’s finding on the question of the defendant’s guilt.” The record, however, contains no statement or comment by the trial judge, after review of its “notes taken at trial” or its recollection of the trial testimony, indicating disagreement with the jury’s verdict. Furthermore, there is nothing in the record which suggests that the trial judge was attempting to avoid its obligation under the rule. In sum, we conclude that the absence of the word “weight” in the court’s analysis under the facts of this case does not require reversal of the entire trial

process. While we agree that the trial court's choice of the adjective "sufficient" was a poor choice to modify the noun "evidence," the trial court's order demonstrates that the court examined the issue under the proper standard, and, in denying the motion, simply misspoke in its conclusion.

The Appellant argues that the trial court's role as the thirteenth juror in this case should be unequivocal due to the victim's two out-of-court recantations and the lack of physical trauma. The issue of the victim's recantation was thoroughly developed at trial as well as the victim's reasons and motives for her admitted recantations. Although the Appellant did not testify at trial, the issue of consent was addressed through cross-examination of the victim. Moreover, as previously noted, the proof also established a DNA match and the probability that the sperm was from another African American other than the Appellant was 1 in 3,517,000.<sup>3</sup> The trial judge heard this compelling proof, as did the jury, and we must presume that following the trial judge's independent review of the testimony of the witnesses at trial, the judge independently weighed the credibility of the evidence, as provided by Rule 33(f), and found no reason to disturb the jury's verdict. Accordingly, this issue is without merit.

### III. Sentencing

Next, the Appellant asserts that the twelve-year sentence imposed by the trial court is excessive. The trial court, in imposing the maximum sentence within the range, found the presence of two enhancement factors: (1) that the Appellant had a previous history of criminal convictions based upon three prior misdemeanor convictions; and (2) that the Appellant abused a position of public or private trust. *See* T.C.A. § 40-35-114(2), (16) (2003). Additionally, the court applied the catchall mitigator based upon the Appellant's stable work history, though giving it little weight. *See* T.C.A. § 40-35-113(13) (2003). The Appellant does not challenge the application of any enhancement factors, and, after *de novo* review, we find no error in their application. On appeal, the Appellant asserts only that the trial court erred by failing to consider "residual doubt" as a mitigating factor.

"By definition, residual doubt [in a capital case] is established by proof that casts doubt on the defendant's guilt." *State v. Hartman*, 42 S.W.3d 44, 57 (Tenn. 2001). The Appellant asserts that the victim's recantations constitute significant residual doubt of the Appellant's guilt. The Appellant, acknowledging that residual doubt is typically applied in capital cases, nonetheless argues that residual doubt is entitled to consideration under the catchall mitigating factor (13), which authorizes the sentencing court to consider "[a]ny other factor consistent with the purpose of this chapter." T.C.A. § 40-35-113(13).

It is undisputed that residual doubt is admissible at the sentencing phase of a capital case. *Hartman*, 42 S.W.3d at 53-58; *see also* T.C.A. § 39-13-204(c), (j)(9) (2003). In *Lockett v. Ohio*, 438 U.S. 602, 604-05, S. Ct. 2954, 2964-65 (1978), the Supreme Court concluded that in order to ensure the reliability of a sentence of death, the Eighth Amendment requires that the sentencer in a capital

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<sup>3</sup>The Appellant is identified in the record as African American.

case be permitted to consider any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. In *Lockett*, the Court reasoned that this holding rested “on the predicate that the penalty of death is qualitatively different from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.” *Id.* at 604; 98 S. Ct. at 2964 (citations omitted). In *State v. Harris*, 989 S.W.2d 307, 316 (Tenn. 1999), our supreme court held that the Eighth Amendment’s narrowing requirements are not extended to cases which do not involve the death penalty. For these reasons, we decline the Appellant’s invitation to extend Eighth Amendment sentencing protections to the instant noncapital case.

### CONCLUSION

Based upon the foregoing, the case is remanded for merger of Count 2 with the Appellant’s conviction under Count 1 for forcible rape. The Appellant’s conviction for rape, in Count 1, and the resulting twelve-year sentence are affirmed.

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DAVID G. HAYES, JUDGE